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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/661,411	09/12/2003	Gary A. Snyder	6522-78332-01	6660

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EXAMINER	
CHAWLA, JYOTI	
ART UNIT	PAPER NUMBER
1794	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/661,411	SNYDER, GARY A.	
	Examiner	Art Unit	
	JYOTI CHAWLA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *24 February 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *15-24* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *15-24* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1)☐ Notice of References Cited (PTO-892)

2)☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3)☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *4/15/2008*.

4)☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.

5)☐ Notice of Informal Patent Application

6)☐ Other: _____.

DETAILED ACTION

Applicant's submission filed on February 24, 2008 has been entered. Claim 20 has been amended. Claims 15-24 are pending and are examined in the application.

Specification

Applicant's arguments dated February 24, 2008 regarding the amendment to the specification not adding new matter have been considered Applicant's response that the specification was not amended, even though the IDS document and the accompanying details of the clerical error submitted on August 7, 2007 were submitted with an amendment and applicant's response (remarks, page 4). The fact that, the examples with alleged typographical errors submitted on 8/7/07 along with the IDS, said changes were not intended to be amendments to the specification is noted for the reasons of record and submission of 8/7/07 will not be considered part of the specification. Only the original specification will be considered as applicant's complete disclosure for the purpose of prosecution of application 10/661,411.

Therefore, the objection under 35 U.S.C. 132(a) of 8/7/07 as introducing new matter into the disclosure has been withdrawn.

Claim Rejections - 35 USC § 112(first paragraph)

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Rejections of claims 15-24 under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement as discussed in the previous office action dated 9/24/2007 are maintained for the reasons of record.

In response to applicant's remarks (pages 4-5) regarding the enablement rejection under 35 USC 112, applicant is referred to the claims as recited. In the instant case the subject matter includes the process of imparting the grape flavor to pome fruit product and the resulting product, where grape flavoring admixture (containing methyl anthranilate) is applied to the surface of the exocarp of post-harvest pome fruit in such a way that the grape flavor is present in the pericarp and the mesocarp of the post-harvest fruit. The fruit thus obtained when stored for at least one month maintains grape flavor. Applicant's response states that "the grape taste was found to be at an optimal level when the grape flavor or complimented the existing flavor of the fruit, whether that flavor is an apple or a pear, for example. The most desirable level of grape flavoring is somewhat subjective, and the most desirable level was found to depend significantly on a taster's personal preferences."
In response to applicant's remarks, whereas it is understood that the desired percentage of methyl anthranilate may vary depending on the fruit that the grape flavor is imparted, however, a target range is required to enable one of skill to make and use the invention. Absent such disclosure it will be assumed that any presence of methyl anthranilate, from just above 0% to just below 100% is implied. If this is the case then any reference having any amount of methyl anthranilate will be deemed to teach imparting the claimed grape flavor, absent any clear and convincing evidence and/or arguments to the contrary.

Claim Rejections - 35 USC § 112 (second paragraph)

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Rejection under 112(second paragraph) for claim 20 for the recitation of the phrase "dipping the grape flavoring admixture to the exocarp of a post-harvest pome fruit" has been withdrawn in light of applicant's amendment of 2/24/2008.

However, claims 20-21 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Rejection of claims 20 and 21 is maintained for the recitation of the term "cold storage" in claim 20 is a relative term which renders the claim indefinite. The term "cold storage" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. It is unclear as to what temperature would be included in the cold storage, e.g., would a temperature of 60°F be considered cold or 40°F be considered cold etc. Thus the claim as recited is unclear.

Claims 20 and 21 are indefinite for the recitation of (Claim 21)"storing of the post-harvest pome fruit for at least one month". The applicant has also not specifically stated the temperature of storage other than cold storage, which is a relative term. Thus it is unclear as to how the fruit is stored, what temperature range, and what storage conditions from the claim as recited. Clarification is required.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

(A) Claims 15-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Shillington et al (US 3533810)in view of the combination of Gross (US 3071474) and methyl anthranilate by www.theqoodscentcompany.com.

The references and rejection are incorporated herein and as cited in the office action mailed September 24, 2007.

Applicant's amendments to claim 20 have been entered and the newly added limitation

"dipping a post-harvest pome fruit having an exocarp, a pericarp and a mesocarp, in the grape flavoring admixture", Shillington teaches of application of a composition comprising methyl anthranilate to post-harvest fruits and vegetables, including pome fruits, such as apples and pears (Column 1, lines 15-35; column 4, lines 73-75; and Example 8). Shillington also teaches the application of composition comprising methyl anthranilate to unpeeled whole fruits and vegetables by coating the surface of the whole fruit, by dipping or immersing the whole fruit in methyl anthranilate containing composition (Column 2, lines 43-61; column 4, lines 57-75), which addresses the new limitation of the recited claims. Thus the obviousness rejection of amended claims 15-24 over the combination of Shillington et al (US 3533810), Gross (US 3071474) and www.theqoodscentcompany.com, as discussed in the previous office action dated September 24, 2007, is maintained for reasons of record.

(B) Claims 15-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Weaver (US 3669684) in view of the combination of Kare (US 2967128), Michael (US 3427167) and Gross (US 3071474).

The references and rejection are incorporated herein and as cited in the office action mailed September 24, 2007.

Note: Office action dated 9/24/2007, Page 9, last paragraph, temperature range of 40F to 70F, appears as 400F to 700F, which is a typographical error and support for 40-70F can be obtained from examples 1-6 of Weaver. Please make a note of the temperature range as taught by Weaver. The temperature range error was inadvertent and any inconvenience to the applicant is regretted.

Regarding applicant's amendment to claim 20 and the newly added limitation "dipping a post-harvest pome fruit having an exocarp, a pericarp and a mesocarp, in the grape flavoring admixture", Weaver teaches a process of enhancing the flavor of foods (e.g., fruit, vegetable, nuts and eggs), where the foods in their natural state may be given

additional flavor of the same or another food, such that a single natural food (e.g., fruit) itself would contain either enhanced or blended flavors (Column 1, line 25-40 and 55-68; Column 2, lines 1- 3). Weaver teaches subjecting the food to a desired flavor-imparting ingredient, such as, the flavor essence or concentrate (Column 2, line 60 to Column 3, line 10).

Weaver teaches exposing the whole natural foods, such as, uncut and unpeeled fruits, vegetables and eggs etc., to desired flavors (Columns 3-6). Weaver also teaches imparting flavors to pears and apples (Column 5 and 6, examples 6, 7, 12 and 13) as recited by the applicant. Weaver, however, does not teach dipping the fruits in the flavoring composition. Kare, however, teaches coating foods with methyl anthranilate that the composition comprising methyl anthranilate can either be sprayed or sprinkled on to the foods or alternatively the foods can be soaked in the composition and dried (Column 3, lines 16-38). Thus flavoring compounds have been employed to impart different flavors or to enhance the natural flavors of harvested whole fruits and vegetables (apples and pears) in the art (Weaver). Methyl anthranilate has been used to flavor crops and food and other articles (by spraying or dipping) to render the treated articles unattractive to birds while still maintaining desirability for other animals and humans (Kare). Methyl anthranilate has also been known in the art for its characteristic grape flavor and aroma that it imparts to the composition it is added (Michael). Grape flavor is also one of the popular flavors for consumers, especially kids. Therefore it would have been obvious to one with ordinary skill in the art at the time of the invention to modify Weaver and apply composition containing methyl anthranilate to apples, pears among other fruits or vegetables to add to the natural flavor of these fruits and also make the natural foods more attractive and palatable for consumers. One would have been further motivated to do so in order to encourage healthier eating habits by giving the regular fruits and vegetables a flavor twist to make eating fruits and vegetables more interesting to children.

Thus as discussed in the previous office action dared 9/24/2007, modified Weaver teaches of application of methyl anthranilate to a pome fruit (apple or pear) having an exocarp, pericarp and mesocarp as recited in the amended claims.

Response to Arguments

Applicant's remarks regarding the specification have been considered and responded in the office action above.

Applicant's remarks regarding the enablement rejection under 35 USC 112 (first) have also been considered and responded in the office action above.

Applicant's arguments filed February 24, 2008 (pages 5-6) have been fully considered but have not been found persuasive. Regarding specific arguments regarding the references, the applicant is referred to the previous office actions.

1) Regarding applicant's argument that "such low concentrations have been used in the past for the purpose indicated in Shillington" and applicant's assertion that the amount of methyl anthranilate disclosed in Shillington et al. would not produce the claimed pome fruit comprising a grape flavor (Remarks, page 5). In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., concentration of methyl anthranilate) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See In re Van Geuns, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

2) In response to applicant's argument that Shillington does not add methyl anthranilate to add flavor to the fruits (remarks, pages 5-6), the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985). Shillington teaches of coating foods with a composition comprising methyl anthranilate, as instantly claimed. Imparting flavor is a known property of the compound and thus Shillington in combination with Gross and www.theqoodscentcompany.com.

teaches of the composition and method as recited in claims 15-24, absent any clear and convincing evidence and/ or arguments to the contrary.

3) Declaration by Mr. Todd Snyder claiming commercial success, Canadian Food Agency Approval and new food product, has been fully considered and has not been found persuasive.

With respect to the present invention meeting encouraging sales, it was notoriously well known in the art, as discussed in the various references cited, that methyl anthranilate coated fruits had enhanced flavor. It was also known that methyl anthranilate can be obtained from grapes and provides grape flavor to foods and beverages. Thus from the viewpoint of patentability, the invention as claimed is obvious over the prior art. Since the instantly claimed invention only requires a positive recitation of methyl anthranilate's property of imparting grape flavor, and does not require the comparison of various grape flavor compounds, the teaching other grape flavored compounds by the reference does not teach away from the instantly claimed invention.

Regarding the **Canadian Food Inspection agency decision to regard the pome fruit with grape flavor as fresh produce (Declaration, pages2-3),** this is not relevant to the issue of obviousness in this case because Patent law is independent from Canadian Food regulatory law. This issue often is discussed with respect to the determination of pharmaceutical utility (MPEP 2107.01: Section V): "Canadian Food Agency approval, however, is not a prerequisite for finding a compound useful within the meaning of the patent laws." In re Brana, 51 F.3d 1560, 34 USPQ2d 1436 (Fed. Cir. 1995) (citing Scott v. Finney, 34 F.3d 1058, 1063, 32 USPQ2d 1115, 1120 (Fed. Cir.1994)).

With respect to the sales and argument of **commercial success**, it is not clear if the claimed invention resulted in the commercial success or whether other factors contributed to the success, such as increase advertising/marketing. "In considering evidence of commercial success, care should be taken to determine that the

commercial success alleged is directly derived from the invention claimed, in a marketplace where the consumer is free to choose on the basis of objective principles, and that such success is not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention, etc" (In re Mageli, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973)).

Thus applicant's remarks and evidence filed 2/24/2008 has been fully considered, however, it has not been found persuasive and the rejections of claims 15-24 are maintained for the reasons of record.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794

Jyoti Chawla
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